Filed 1/15/13 E1 Films Canada v. Syndicate Films CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

E1 FILMS CANADA INC., Plaintiff and Respondent, v. SYNDICATE FILMS INTERNATIONAL, Defendant and Appellant.	B236146 (Los Angeles County Super. Ct. No. BC427536)

APPEAL from a judgment of the Superior Court of Los Angeles County. William F. Fahey, Judge. Affirmed.

Nahai Law Group, Behzad Nahai, Jeffrey Lewiston and Edward Wei for Defendant and Appellant.

Law Offices of Alan S. Gutman, Alan S. Gutman and John Juenger for Plaintiff and Respondent.

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Following a bench trial, the trial court issued a statement of decision and entered judgment in favor of plaintiff and respondent E1 Films Canada Inc. (E1) on its breach of contract claims against defendant and appellant Syndicate Films International, LLC. The trial court ruled that E1 met its burden to show it was entitled to a refund of payments made in connection with an agreement for the Canadian distribution of certain films.

Appellant contends that substantial evidence does not support the judgment with respect to either liability or damages for breach of contract, and that prejudgment interest should not have been awarded. We affirm. Substantial evidence supported the trial court's determination that appellant breached the agreement and that E1 was entitled to damages in the amount of $1,390,000 plus prejudgment interest.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties.

E1 distributed feature films and television programs in Canada and other countries throughout the world. Its parent company was E1 Entertainment. Patrice Théroux had been E1's president since mid-2006 and had been an entertainment executive with a different company for the previous 18 years.

Appellant was a foreign sales agent, affiliated with the Yari Film Group. Its role was as a foreign distributor, selling rights on behalf of producers; it did not independently produce films or acquire films for licensing. As the president of appellant, David Glasser oversaw international distribution and sales for appellant between 2004 and 2008. Glasser was also the chief creative officer for the Yari Film Group.

The Output Term Sheet.

Théroux and Glasser began discussing the notion of an output agreement between their companies sometime in October 2007, and they were the individuals primarily involved in negotiating the Output Term Sheet (OTS). The purpose of the OTS was to give E1 the right to distribute in Canada any films that were acquired or produced by Yari Film Group and released theatrically in the United States. The final version of the signed OTS was dated February 26, 2008.

The OTS was between appellant "in its capacity as sales agent for the licensor of a Picture" and E1 "for the exclusive distribution in Canada of certain motion pictures [appellant] acquires and/or produces beginning with that Picture entitled 'Assassination of a High School President' aka 'The Sophomore.'" In the film industry, the term "sales agent" typically describes an entity that sells movies to distributors. It does not mean that the entity operates as an actual agent.

In paragraph 3, the OTS defined the films to be included as "any motion picture produced or acquired by [appellant] or any subsidiary, or any affiliated, related, wholly or partly owned or associated companies of [appellant], which (subject to Paragraphs 12 and 14) is released theatrically in the United States" during the two-year output term by Yari Film Group or any other approved United States distributor. "Theatrical release" means exhibiting a film in a commercial movie theater in the United States. This paragraph was important to E1 because it guaranteed a certain level of quality release necessary to establish credibility for Canadian distribution.

Paragraph 4 set forth a number of "minimum guarantee" payments for which E1 would be responsible. With the minimum guarantee, appellant was able to use E1's financial commitment for distribution as a means to obtain financing for the films from a bank. In other words, E1's commitment to pay a minimum guarantee on a particular film was being used to help finance the production of the film. For a film produced by appellant or any related entity, E1 agreed to pay as a minimum guarantee an amount equal to five percent of the film's final budget, a standard figure in the industry. The OTS also explained how to calculate a film's final budget and required that no later than delivery of the film appellant provide to E1 either a copy of the bonded budget verified by a completion guarantor or a statement of the film's actual costs, verified by appellant's chief financial officer. The verification safeguards were significant to E1, which was obligated to pay a percentage of an otherwise unknown figure. Once a film was released for distribution, paragraph 9 of the OTS described the fee to which E1 was entitled, which included recoupment of the minimum guarantee and expenses.

Paragraph 13 of the OTS required appellant to provide to E1 evidence of a film's theatrical release in the United States, specifying a range of a number of screens corresponding to a film's budget. For example, for each film with a budget of less than $15 million, appellant was obligated to provide E1 with evidence of a United States theatrical release commitment on 500 screens simultaneously. E1's minimum guarantee was significantly impacted by the film's theatrical release, as a film's value is determined in large part by its manner of release.

In the event that appellant failed to satisfy its obligations under paragraph 13 of the OTS, paragraph 14 provided it with three options. First, appellant could terminate the film's license agreement, which also required it to refund E1's minimum guarantee with interest and its distribution expenses. Second, appellant could allow for a percentage reduction of the minimum guarantee, calculated on the basis of the difference between the number of screens initially agreed for the release and the number of screens on which the film was actually released. Third, appellant could elect to have E1 pay a specified reduced minimum guarantee calculated on the basis of the film's budget. The second and third options required appellant to send E1 notice of its election within 30 days of the initial release of the film in the United States, and to provide either a refund or recalculated minimum guarantee to E1 within the following 30 days. With respect to any refund payment obligation, paragraph 14 concluded: "Any refund payable to [E1] pursuant to this Paragraph 14, will be paid by [appellant] and [appellant] will provide [E1] with a guaranty for those amounts from a financially suitable entity willing to provide a guaranty (such entity to be approved by [E1] in its sole discretion)." Théroux understood that appellant would be responsible for the refund; the parties never discussed that an entity other than appellant would be responsible for the refund to E1. The reimbursement term was heavily negotiated and important to E1.

Other provisions of the OTS included cross-collateralization specified in paragraph 11, which permitted E1 to offset profits and losses among individual films within in a four-film group. Paragraph 15 contemplated the execution of additional agreements for each distributed film, including a license agreement, a side letter setting

forth the United States theatrical release commitment and a "notice and acceptance of assignment" (notice) for financing purposes. The final paragraph of the OTS provided: "The parties intend to prepare and sign a more formal agreement incorporating the terms of this Output Term Sheet as well as terms which are customary for transactions of this type, but unless and until such an agreement is signed, this Output Term Sheet shall constitute a binding contract between the parties." The parties never executed a more formal agreement and considered the OTS to be binding.

The Four Films.

Appellant delivered four films to E1: *Nothing But the Truth, What Doesn't Kill You, The Lonely Maiden* and *Assassination of a High School President*. Consistent with paragraph 15 of the OTS, the parties executed separate license agreements—called "distribution agreements"—for each of the four films.[1] Appellant signed each of the distribution agreements as a sales agent for each single purpose entity which served as the film's licensor. According to Glasser, the distribution agreements provided that Bob Yari Productions (BYP) would guarantee appellant's obligations identified in paragraph 14 of the OTS. BYP prepared the side letters and Glasser signed them on appellant's behalf. The notices were the vehicles by which E1 confirmed its promise to pay the minimum guarantee amounts and the licensor for each film agreed to assign the right to payment of that amount to a bank as security for financing the film.

The films were subject to the five percent minimum guarantee payment in the OTS. For the films *Nothing But the Truth, What Doesn't Kill You* and *The Lonely Maiden,* E1 became obligated to the Bank of Ireland for a total amount of $2,185,280, which E1 ultimately negotiated down to $1,990,000. For the film *Assassination of a High School President,* E1 became obligated to Bank Leumi for some amount over $200,000. E1 distributed each of the four films in Canada in a DVD format.

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[1] As some of the distribution agreements predated the OTS, appellant and E1's predecessor, 6867561 Canada Inc., were the parties to the distribution agreements.

By February 2009, E1 concluded that appellant had breached its obligations under the OTS and the distribution agreements by failing to provide advance notice of the films' release dates and by releasing the films on fewer than 500 screens. Two of the films were theatrically released on a handful of screens for awards consideration and two of the films were released only on DVD. A film that is not theatrically released—otherwise known as a straight-to-video film—has a lesser value because it has no income stream from a theatrical release and the value of its video or television release is correspondingly diminished.[2] E1 sent a series of demand letters to appellant, BYP and the licensor under the distribution agreements—all at the same address—seeking reimbursement of a portion of the minimum guarantees under either the second or third option provided in the OTS. Only appellant responded, rejecting E1's demands in their entirety.

Pleadings, Trial and Judgment.

In December 2009, E1 filed its initial complaint for breach of contract and fraud against appellant, Bob Yari and BYP. In January 2010, the action was stayed against BYP, then in chapter 11 bankruptcy, and E1 later dismissed Yari from the action. E1 received leave to file the operative first amended complaint (complaint) in November 2010, which alleged four causes of action for breach of contract against appellant and BYP and a cause of action for fraud against appellant, BYP and Yari. The complaint specifically referenced the OTS as providing a basis for liability. E1 sought damages in the amount of $2,070,098, which it asserted was the difference between the minimum guarantees it paid and the amount of the reduced minimum guarantees it should have paid in light of the films' limited theatrical releases. Appellant answered the complaint, denying the allegations and asserting several affirmative defenses.

The trial court denied both E1's and appellant's motions for summary adjudication on the breach of contract claims.

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[2] During closing argument, appellant's counsel conceded that the films were not theatrically released and each went straight to video.

Prior to the commencement of trial, E1 dismissed BYP from the fraud cause of action and stipulated to resolve its contract claims against BYP in bankruptcy court. Current and former employees of the parties testified during a four-day bench trial. At the conclusion of E1's case, the trial court granted appellant's motion for judgment on E1's fraud cause of action. The trial court permitted both posttrial briefing and closing argument. After it submitted a tentative statement of decision and thereafter received and considered the parties' objections and clarifications, the trial court filed a final statement of decision in June 2011.

The trial court found that E1 met its burden of proof on each of its causes of action for breach of contract. It found the evidence established that E1 was entitled to a refund of a portion of the minimum guarantee payments for the four films. It concluded a refund was warranted on the basis of evidence showing the films were not theatrically released in the United States, appellant failed to provide advance notice of the limited release, and it did not elect to terminate the agreement. In finding appellant liable for the refund, the trial court determined the evidence established that it was a principal in the transaction and not merely an agent. The trial court also found that the evidence did not support appellant's assertion that the OTS was superseded by the distribution agreements.

With respect to damages, the trial court found that E1 showed it had paid $1,990,000 to the Bank of Ireland for three of the films. It reduced that amount by $600,000—the reduced minimum guarantee amount—to conclude that appellant owed E1 $1,390,000. It ruled that E1 did not present sufficient evidence to show it incurred out-of-pocket losses for the distribution of the fourth film, *Assassination of a High School President.*

In July 2011, E1 filed its cost memorandum and moved for an award of prejudgment interest. The trial court initially entered judgment on July 25, 2011. After granting E1's prejudgment interest motion in September 2011, it entered an amended judgment which included an award of $5,297.96 in costs and $120,578.64 in prejudgment interest.

This appeal followed.

DISCUSSION

I. Standard of Review.

In a bench trial, the trial court "is the sole arbiter of the facts" and our review of its factual findings is limited. (*Navarro v. Perron* (2004) 122 Cal.App.4th 797, 803.) "'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]'" (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765; accord, *Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189; *TME Enterprises, Inc. v. Norwest Corp.* (2004) 124 Cal.App.4th 1021, 1030.) "The substantial evidence standard of review applies to both express and implied findings of fact made by the court in its statement of decision. [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.)

II. Substantial Evidence Supported the Trial Court's Findings.

A. Substantial Evidence Showed That Appellant Was Liable for Breach of the OTS.

In its first four causes of action, E1 alleged that appellant breached the OTS and the distribution agreements by failing to provide evidence of a sufficient United States theatrical release for each of the four films, failing to elect one of the remedies under paragraph 14 of the OTS required by the lack of theatrical release and failing to refund the difference between the minimum guarantee payment and the reduced minimum guarantee E1 thereafter requested pursuant to the OTS. After outlining the evidence offered during trial, the trial court concluded that E1 met its burden of proof on those

allegations. It summarized: "Counsel for SFI [appellant] conceded during closing argument that the four films were not theatrically released in the United States. Instead, 'they went straight to video.' Further, the Court concludes that SFI had failed to provide E1 with advance written notice of the limited U.S. release for the films. SFI's counsel also conceded that SFI did not elect to terminate the agreement. Accordingly, E1 is entitled to a refund under paragraph 14 of the OTS."

Substantial evidence supported the trial court's conclusion. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Here, the evidence showed that the OTS constituted a binding contract between E1 and appellant. The language of the OTS unambiguously provided that "this Output Term Sheet shall constitute a binding contract between the parties" and representatives for both parties testified that they considered the OTS as a binding agreement. The evidence also showed that E1 performed under the OTS by becoming obligated to pay the minimum guarantees to a third-party bank and by distributing the four films in Canada. Further, the evidence established that appellant breached the OTS by failing to satisfy its United States screen commitment under paragraph 13 of the OTS and failing to provide E1with any of the remedies required by paragraph 14 of the OTS for the lack of theatrical release. Finally, the evidence showed that EI suffered damage as a result of appellant's breach through its payment of the full, unreduced minimum guarantee amounts.

Appellant argues that it could not have liability under the OTS because the evidence showed it was acting as an agent on behalf of each film's licensor. (See *Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1442 ["'Where the signature as agent and not as a principal appears on the face of the contract, the principal is liable and not the agent'"]; *Sackett v. Wyatt* (1973) 32 Cal.App.3d 592, 597 ["Under California law it is settled that a personal judgment for damages for breach of contract may not be obtained against a known agent of a disclosed principal"].) In support of its argument, it

points first to the language of the OTS that it entered into the agreement "in its capacity as sales agent for the licensor of a Picture" and, second, to E1's conduct in seeking a refund of the minimum guarantee payments from BYP and not appellant directly.

After weighing conflicting evidence, the trial court expressly rejected appellant's arguments. It concluded "that the refund is owed by both SFI *and* the guarantor. This is the only fair reading of the concluding language of paragraph 14. It is also the only interpretation consistent with the credible parol evidence introduced at trial. The Court gives minimal weight to the contrary conclusory testimony of SFI's witnesses." It is well settled that in our review of this determination, "[w]e may not reweigh the evidence and are bound by the trial court's credibility determinations." (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.)

Again, substantial evidence supported the trial court's determination. First, the trial court was "not persuaded by [appellant's] definition of 'sales agent.'" It expressly gave "minimal weight" to testimony by the Yari Film Group's former general counsel William Immerman that the term "sales agent" meant an agent acting on behalf of someone else. His testimony conflicted with that of Théroux and E1's vice-president of business and legal affairs, Richard Rapkowski, who both stated that the term "sales agent" has a particular meaning in the film industry distinct from an actual agent, and that sales agents enter into agreements in their own name. The trial court found significant that Glasser signed the OTS on behalf of appellant, not as an agent. It also noted that the OTS granted E1 distribution rights over the entirety of appellant's acquired and produced films and not just the four films at issue, and that the OTS's cross-collateralization provision would be meaningless unless appellant was acting as a principal able to negotiate those rights on behalf of multiple licensors. Finally, the lack of any agency agreement also supported the trial court's finding. Though appellant tried to suggest that there was an oral agency agreement between it and the film licensors, "there was no testimony by any trial witness as to who entered into such an oral agreement, when or where it was made and what were its terms."

The trial court likewise found it insignificant that E1 initially demanded its refund from guarantor BYP rather than appellant. The demand letters were addressed to appellant, BYP and the individual licensors at the same address, and only appellant responded. Paragraph 14 of the OTS provided that any refund "will be paid" by appellant and required appellant to secure a guarantor for that payment. No draft of the OTS ever proposed changing that language to provide that any refund would be paid by a licensor rather than appellant. Moreover, the evidence showed that appellant, BYP, the Yari Film Group and the four film licensors were essentially interchangeable, sharing common ownership, business and e-mail addresses, employees and corporate titles. For example, Glasser simultaneously served as appellant's president, the Yari Film Group's chief creative officer and the executive producer of the four films. Rapkowski testified that the reason he demanded payment from BYP rather than appellant was that E1 "considered all of these companies to be one and the same, controlled by the same controlling minds. E-mails were coming with e-mail signatures from all of these interchangeably, the principals of these companies were all working for all of them interchangeably, and in my mind this was all one company." Accordingly, substantial evidence supported the trial court's determination that "there was no legal 'principal' or 'agent.' It would be contrary to the evidence and manifestly unjust to conclude that SFI was only an 'agent,' and thus immune from liability, in the face of the corporate fictions erected by these various Yari Film Group entities."

B. Substantial Evidence Supported the Amount of the Damage Award.

Appellant next contends that E1 offered insufficient evidence to support the trial court's award of $1,390,000. "The amount of damages . . . is a fact question . . . [and] an award of damages will not be disturbed if it is supported by substantial evidence. [Citations.] The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure." (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691; accord, *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.)

E1 sought an award of over $2 million, which it calculated as the difference between the minimum guarantee of five percent of the four films' final budget ($2,920,098) and the reduced minimum guarantee amounts for each film specified in paragraph 14 of the OTS ($850,000). The trial court ruled that the credible evidence supported a lesser amount, as Théroux's testimony and corresponding exhibits showed that E1 had negotiated its minimum guarantee obligation to the Bank of Ireland for three of the films down to $1,990,000 and had transferred at least $1 million of that amount to the bank. The trial court then subtracted from that amount the reduced minimum guarantees owed by E1 under paragraph 14 of the OTS—$600,000 total for three of the films—to reach a total award of $1,390,000. It concluded that E1 had not met its burden to show that it had paid or obligated itself to pay any specified amount to the Bank Leumi or any other bank for the fourth film, *Assassination of a High School President*, and awarded no damages for that film.

Appellant asserts that E1 did not offer evidence establishing actual payment of the full $1,990,000 amount and therefore failed to show that it was entitled to any refund under paragraph 14 of the OTS, which provided that the refund is "the difference between the Minimum Guarantee *paid* for such Picture and the Reduced Minimum Guarantee . . . ." (italics added). But appellant's argument amounts to nothing more than a request to reweigh the evidence, which we may not do. "'"[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom."' [Citations.] Our role is limited to determining whether the evidence before the trier of fact supports its findings. [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766; see also *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 643 ["An appellate court has no power to reweigh the evidence"]; *Brough v. Governing Board* (1981) 118 Cal.App.3d 702, 718 ["It is the function of the trial court to weigh the evidence and reconcile conflicts therein"].)

To substantiate its claim for damages, E1 offered Théroux's testimony that E1 made payments on the minimum guarantee amounts in connection with the four films, it negotiated a settlement with the Bank of Ireland which reduced its total obligation by approximately 10 percent, the negotiated total was $1,990,000 and E1 paid the Bank of Ireland. E1 also offered documentary evidence including the signed settlement agreement between it and the Bank of Ireland, and a $1 million wire transfer from it to the Bank of Ireland. The trial court found the testimony and exhibits constituted "credible evidence . . . that E1 negotiated its financial obligation to the Bank of Ireland for three of the films to the reduced amount of $1.990 million."

Against this figure, the trial court subtracted the $600,000 reduced minimum guarantee obligation. It also declined to award any amount for the fourth film on the grounds that Théroux's testimony was "vague and unpersuasive" and E1 offered no business records in support of the asserted payment. Finally, the trial court rejected the argument that appellant has renewed on appeal, finding no evidentiary basis for an additional reduction for amounts that E1 may have recouped from distributing the films. It found Théroux's testimony unclear on the point and observed that appellant offered no evidence of E1's recoupment.

We conclude that the damages award "was the result of measured deliberation by a conscientious judge" and supported by substantial evidence. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 392; see also *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 [appellate court will uphold a judgment "supported by evidence which is 'substantial,' that is, of '"ponderable legal significance,"' '"reasonable in nature, credible, and of solid value"'"].)

III. The Trial Court Properly Awarded Prejudgment Interest.

The trial court granted E1's motion for an award of prejudgment interest, determining that it was entitled to an additional $120,578.64. In its motion, E1 relied on Civil Code section 3287, subdivision (a), which provides in part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and

the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Appellant argues that prejudgment interest was improperly awarded because damages were uncertain in the absence of an accounting.[3] We independently review when and whether damages were certain or capable of being made so within the meaning of Civil Code section 3287, subdivision (a). (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390–391.)

"'"The test for recovery of prejudgment interest under [Civil Code] section 3287, subdivision (a) is whether *defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount. [Citation.]" [Citations.] "The statute . . . does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations.]" [Citation.] Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate. [Citation.]' [Citation.]" (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 774.)

Applying these principles, we conclude the trial court properly determined that the amount of damages owed was ascertainable prior to trial. The OTS specified the manner of calculating the amount owed to E1 in the event that appellant failed to satisfy its United States theatrical release commitment. Paragraph 14 of the OTS provided in part: "Distributor [E1] will have the right to receive a refund of the difference between the Minimum Guarantee paid for such Picture and the Reduced Minimum Guarantee and interest on the amount of the refund (at prime + 1%), from SFI, within thirty (30) days from Licensor's receipt of an invoice from Distributor for those amounts . . . ." E1 sent two invoices in February 2009 and a third in September 2009. While appellant refused to pay the invoices on the ground they were premature, it never challenged E1's calculations

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[3] We summarily reject appellant's alternative argument that prejudgment interest was improper under Civil Code section 3287, subdivision (b), as the record unambiguously shows the award was made pursuant to subdivision (a).

or sought additional information. Accordingly, the amounts that E1 sought as damages were readily ascertainable from the information it provided to appellant in accordance with the OTS.

We find no merit to appellant's argument that an accounting was necessary to ascertain the amount of E1's damages. Appellant relies on a qualifying provision in paragraph 14 of the OTS, which provides that appellant must pay the invoiced amount "if, on or before the date of the invoice, Distributor has not recouped the amount of the refund and interest on the refund (at prime + 1%) from any Overages, not already allocated to any Picture in a Crossed Picture Group, payable to SFI pursuant to Paragraph 9 by such date." It argues that Théroux's testimony that E1 recouped some amount from its Canadian distribution of the films demonstrated the amount due was not readily ascertainable. But appellant ignores E1's representation in each of the letters accompanying the invoices that "[w]e hereby provide notice that Distributor has not recouped the amount of the refund from any Overages, and that the full amount of the refund is therefore payable to Distributor." Whether E1 was able to recoup some amount from distribution subsequent to its invoice submission was irrelevant to the invoice calculations, given the OTS's requirement that any recoupment must have occurred on or before the date of the invoice in order to qualify as a set-off.

Accordingly, prejudgment interest was properly awarded under Civil Code section 3287, subdivision (a).

DISPOSITION

The judgment is affirmed. E1 is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST